

8

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

NORTHERN PACIFIC RAILWAY COMPANY,  
Plaintiff in Error,

vs.

J. R. THOMPSON, as County Treasurer of Flat-  
head County, Montana,

Defendant in Error,

and

J. R. THOMPSON, as County Treasurer of Flat-  
head County, Montana,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
Defendant in Error.

---

**REPLY BRIEF OF  
NORTHERN PACIFIC RAILWAY CO.**

---

GUNN & RASCH,  
Attorneys for Northern Pacific Railway Company.

---

FILED  
FEB 20 1918  
F. D. MONTGOMERY



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

NORTHERN PACIFIC RAILWAY COMPANY,  
Plaintiff in Error,  
vs.

J. R. THOMPSON, as County Treasurer of Flathead  
County, Montana,  
Defendant in Error,  
and

J. R. THOMPSON, as County Treasurer of Flathead  
County, Montana,  
Plaintiff in Error,  
vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
Defendant in Error.

**Reply Brief of Northern Pacific Railway Company.**

In the brief for the County Treasurer the case of Wells vs. McHenry, 74 N. W. 241, is cited in support of the proposition that the lands in question were taxable after the survey in the field. The Court in the opinion in that case says: "But it is insisted that this land was not taxable because the survey fees had not been paid. In this connection counsel for the receivers cite the Rockne Case, 115 U. S. 600.

The Act of Congress which modified the rule laid down in that case was qualified by the proviso that it should not apply to unsurveyed land. If these lands were at the time they were assessed unsurveyed within the meaning of the statute, it is clear that they could not be taxed." The Court held that the lands were surveyed and subject to taxation as soon as surveyed in the field. The case does not appear to have been cited or recognized as an authority.

As railroad lands are treated and regarded as public lands for all purposes, except sale, until they are identified by a survey, it must follow that the right of the United States to the possession, use and enjoyment of such lands continues until the lands cease to be public lands and become private property. If our contention is correct, that until a survey becomes a completed administrative act by the filing of the plat in the local land office, the approval by the Commissioner of the General Land Office may be withdrawn and the survey abandoned, then the right of the United States to the possession of railroad lands must continue until the plat is filed, and to permit the lands to be taxed before that time might result in depriving the United States of the possession, use and enjoyment of unsurveyed railroad lands.

The case of *Wells vs. McHenry* completely overlooks the right of possession of the United States to railroad lands until they are surveyed. This is probably due to the fact that the decisions defining the status of unsurveyed railroad lands and holding that the United States may recover for timber taken

therefrom and prevent the inclosing of such lands were rendered after the decision in *Wells vs. McHenry*.

To hold that railroad lands may be taxed before the right of possession of the United States ceases would require the payment of taxes by the railroad company upon lands of which it is not entitled to possession and of which it can make no use or derive any benefit. This would be contrary to the fundamental principles of the law of taxation.

In the case of *Northern Pacific R. R. Co. vs. Rockne*, 115 U. S. 600, which involved the right to tax Northern Pacific lands before the cost of surveying had been paid, the Court said:

“It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the cost of surveying these lands. If, on the other hand, the sale could not confer such a title, it is because there exists no authority to make it.”

The same reason which impelled the Court to hold Northern Pacific lands could not be taxed until the cost of surveying was paid argues conclusively that such lands cannot be taxed while they are regarded as public lands and the United States is entitled to the possession, use and enjoyment of same.

In the *Morrison* case, it was contended that the survey when approved “related back to the date of the grant or at least to the date of the survey in the field.” The Court said:

“And if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of relation cannot be invoked to destroy this authority.”

For the same reason that the doctrine of relation cannot defeat the right of disposal by the United States as held in the Morrison case, the doctrine of relation cannot take away from the United States the right which it has to the possession, use and enjoyment of railroad lands until the survey thereof has become a completed administrative act.

Respectfully submitted,

GUNN & RASCH,

Attorneys for Northern Pacific Railway Co.